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IN THE

Supreme Court of the United States

October Term, 1976

No. 77-394

JOHN R. MANSON, Commissioner of Corrections of the State of Connecticut,

Petitioner,

—v.—

PAUL MOYNAHAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The respondent would direct this Court to the denial of the petition for certiorari in *State* v. *Moynahan*, 164 Conn. 560 (1973) [Docket No. 73-328, 414 U.S. 976 (1973)].

Nature of Original Proceeding

This action was commenced in the United States District Court for Connecticut pursuant to 28 U.S.C. §§ 2241, 2254.

Questions Presented

1. Did the trial court err in concluding upon a review of the state court record that the defendant had been denied his Sixth Amendment Right to Confrontation by reason of the state court's refusal to allow cross-examination of a prosecution witness with respect to matters of bias, interest or motive?

2. Did the trial court err in concluding, after a review of statements which were previously withheld by the prosecution in the state court trial notwithstanding the defendant's motion for their production, that this withholding violated the defendant's Due Process Rights?

3. Did the trial court err in concluding that the manner by which the State obtained and subsequently used the invocation of the Fifth Amendment Privilege against Self-Incrimination by a prosecution witness violated the standards set forth in *Namet* v. *United States*, 373 U.S. 179 (1963)?

Statement of the Case

The state court proceeding charged the defendant who was the then Deputy Superintendent of the Waterbury Police with receiving a stolen television set from one Charles Vernale.

The State's case rested upon three major witnesses. The first was the thief, John Bishop, who testified at the trial that a set found in the woods in a Town outside of Waterbury was one which he had stolen some years before, had delivered to Charles Vernale and at a later date, had delivered in the company of Charles Vernale to the defendant.

The second was the fence, Charles Vernale, who was called by the State and in response to questions by the State invoked the Fifth Amendment on three occasions.

The third was Edward Miller who claimed that he had repaired a set at the Moynahan home some years before and that the set identified by Bishop was the same set.

Prior to the trial an extensive request for exculpatory material had been made by the defense and was granted. However, notwithstanding the fact that the police and the State had taken numerous recorded statements and/or statements signed under oath and secret grand jury testimony from numerous witnesses including Bishop, Vernale and Miller, the only production was a one page letter from the prosecutor saying that Vernale had testified on one occasion that he had not given a television set to the defendant.

At the trial, after the direct testimony of John Bishop, the defense moved again for prior statements and testimony of this witness. The State objected but after an in camera inspection the court ordered their production in their entirety.

These statements revealed that John Bishop had given prior statements which contained different versions of the facts relating to the make, model and size of the set, the place where it was stolen and the date, time and manner of delivery. These inconsistencies were brought out on cross-examination.

Bishop also revealed that he had a lengthy past criminal record and had admitted to some 30 to 35 breaking and entries and the theft of numerous goods in these breaks, but had not yet been charged with any of these offenses. He also acknowledged that he had pleaded guilty to one charge some seven months before, but had

not been sentenced.[1] Nonetheless he denied any promise or inducement in return for his testimony except that the sentencing judge would learn of his cooperation.

During the course of its own argument to the jury the State characterized John Bishop as follows: "Now Vernale and Bishop are no prizes, . . ."

The State thereafter called Charles Vernale and the events which followed give rise to one of the points now sought to be reviewed, since the district court concluded that the situation fit the prohibition of *Namet* v. *United States*, *supra*, and later interpretations of it.

Basically the Record shows that Vernale was called by the State. The defense immediately presented a lengthy argument in the jury's absence that Vernale intended to invoke the Fifth Amendment, which invocation, if done, would violate the defendant's Sixth Amendment rights. Therefore, the court was asked to make an inquiry in the jury's absence. In support of its assertion the defense had present Vernale's court-appointed public defender, Peter Carolan, Esq. The court refused to hear him.

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[1] Bishop admitted at the hearing on a new trial that he received a suspended sentence on this charge and was never presented on the other charges.

He also revealed that prior to Moynahan's trial he had attempted suicide while in Montville jail and had been transferred to Norwich State Hospital. This was during the time he was being interrogated by the State Police. Bishop testified that the history of that hospitalization confirmed that this suicide was brought on by the pressure being exerted on him by the State Police to give information against Moynahan. The defense was never told this before or during the Moynahan trial and did not know about it then. Also at the petition for a new trial the petitioner offered the testimony of two prison inmates and the affidavit of a third that John Bishop had stated in their presence that he had made a deal to testify against Paul Moynahan and that he was going to lie.

The court further appeared to misapprehend the argument and dismissed it in the following manner:

> "The Court: But Mr. Hennessey, you don't have the right to make these claims. You, as counsel for Mr. Moynahan, have no standing to make any claims with reference to whatever rights Mr. Vernale has.
>
> • • • • •
>
> The Court: Mr. Hennessey, you have no right to be concerned with Mr. Vernale's rights. That is not your function as defense counsel for Mr. Moynahan. You have no standing to even make these comments to the court.
>
> • • • • •
>
> The Court: The State has the right to call anybody. The State has the right to call you. The State has the right to call me as a witness, if necessary. You have no rights here."

It did, however, finally offer to make such inquiry if the prosecutor agreed. The State still objected, relying solely on the theory that it did not know if Vernale was going to invoke the Fifth Amendment.

Vernale was then allowed to take the stand and in answer to a prosecution question he invoked the Fifth Amendment. The prosecutor then asked a second question and Vernale invoked the Fifth Amendment again.

The prosecutor then asked the following question and obtained the following answer,

> "Q. Did you ever make a gift of a television set, a color television set to Mr. Moynahan?
>
> A. I take the Fifth Amendment on that. I don't want to incriminate myself."

Thereafter during its rebuttal argument to the jury the prosecution made the following reference to Charles Vernale,

> ". . . And Charles Vernale was asked, 'Did you give the defendant, Paul Moynahan a color television set? Did you deliver it to him?' And he took the Fifth Amendment. He is not a very great guy."

The State also called Edward Miller and the circumstances surrounding his testimony give rise to the other two issues now submitted for review.

The evidence of Edward Miller offered by the State related solely to his actions as a repairman in repairing a set at the Moynahan home and later identifying a set shown to him by the State Police as the same set.

At the commencement of cross-examination Edward Miller testified that he had given statements to the Connecticut State Police on February 17, 18 and 19, 1969, and before the Grand Jury. The defendant moved for these statements and the State objected. The defense further requested an in camera inspection which the court declined to do. Rather it issued an order that the State turn over any matter which would be of assistance to the defense. The prosecutors then reviewed and redacted the statements. The redacted portions were sealed without inspection.[2]

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[2] The Supreme Court of Connecticut declined to look at the sealed documents, since their ruling was in effect that a defendant is not entitled to relief because of a denial of production unless the defendant can demonstrate that he was prejudiced by it. Since the defendant did not know what was in the statements he could not demonstrate the harm resulting from such nondisclosure and since such harm could not be shown the Court saw no reason to

[Footnote continued on following page]

In the jury's absence the trial judge thereafter requested a statement as to the parameters of the proposed cross-examination. The defense indicated that it appeared from the facts known at that time that Edward Miller was probably linked with Charles Vernale and therefore the defense wanted to cross-examine him to establish his criminal involvement as evidence of his bias, interest or motive to testify on the State's behalf. The State objected on the ground that, since Miller had not been arrested, no such inquiry could be pursued.

The Court then adjourned without ruling and in an in chambers conference heard further argument. It then ruled that if any questions were asked in the jury's presence concerning Miller's possible criminal involvement a mistrial would be declared. The defense then requested an opportunity to examine Miller outside the jury's presence in order to establish facts for an offer of proof.

The court agreed to this procedure. However, as soon as questions touching on the purchase of sets were asked the State objected, and the court did not permit Miller to answer. As to these rulings the defense excepted in accordance with Connecticut Practice. During this inquiry the defense also asked questions concerning whether Miller was told he was under investigation, whether he was apprehensive and whether any promises, threats or inducements had been made. The witness was allowed to answer these questions and denied any promises or threats, denied any apprehension or fear during interrogation and stated that he had not been told nor did he believe that he was under investigation by the State Police.

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see what the statements contained. The Judge at the hearing for a new trial was also asked to examine the statements but similarly declined. *Moynahan* v. *State*, 31 Conn. Sup. 296, 329 A.2d 619 (1974).

The subsequent disclosure in this proceeding of the redacted portions of the requested statements revealed that each of those answers were contradicted by the withheld evidence.

Miller was thereafter cross-examined on limited areas permitted by the court and a review of the redacted portions of his statements reveal that several of the answers on cross-examination were also false, or at least were contradictory to what he had previously told the police or one-man grand jury.[3]

After the ruling by the court barring any cross-examination relative to Miller's criminal involvement the defense tried to introduce this line of evidence collaterally through two witnesses, Stevens and Gaspari, both of whom bought stolen sets from Miller. However, upon the State's motion the jury was excused and the defense was required to question Mr. Stevens in the jury's absence. The State objected to allowing the testimony to be heard by the jury on the ground that it was an attempt to bring in collaterally what the court had already ruled out on cross-examination, i.e. to cross-examine Miller as to his possible criminal involvement. The court then ruled that no evidence from these two witnesses could be heard by jury. Exceptions to these rulings were also taken.

During the closing argument the state characterized the testimony of Edward Miller as follows:

MAIN ARGUMENT

> "... There is one man in this case that we can believe, if anybody, Ed Miller. This is the one man that we know is telling the truth. . .

[3] Miller was called by the defendant at a post-conviction hearing on a petition for a new trial and was asked whether he had committed perjury when he testified at the original trial. Miller refused to answer and invoked his Privilege Against Self-Incrimination.

REBUTTAL ARGUMENT

> "... Now Vernale and Bishop are no prizes, but what about the other witness Edward Miller. The defense has tried to get at him but had a hard time trying. You should believe Ed Miller because he has no axe to grind in this case. He has no possible motive to tell an untruth . . . Why would Ed Miller do a thing like this? He was merely questioned by the State Police. He was subjected to intensive cross-examination, which must have been unpleasant. And he only got involved because he was interviewed, since there is not one shred of an indication as to his being motivated to do harm or damage to the defendant. . . ."[4]

When the redacted portions were first reviewed by the defense pursuant to the order of the federal district court in this case, they disclosed the following examples of false or contradictory statements at trial:

1. Edward Miller answered "No" when asked if he was told by the State Police that he was under investigation whereas in truth this had been made crystal clear to him by the police.

2. He testified he was not threatened by the police when in fact he had been.

3. He testified there was no promise as to what would occur if he testified when in fact there had been.

4. He testified there wasn't even a conversation about promises when in fact there had been.

[4] With respect to this argument the federal district court noted, "This argument borders on the unconscionable considering the prosecution's knowledge of Miller's involvement." See Appendix C of Petitioner's Brief, p. 15a, fn. 10.

5. He testified that he wasn't apprehensive when being questioned by the police when in fact he had been.

6. He testified that there wasn't even a suggestion that he was under investigation when in fact there had been repeated indications that he was.

7. He testified that he didn't at any time think he was under investigation when he knew he was.

8. He testified that nothing was ever said about what would happen to him if he did or did not cooperate whereas there was in fact such conversation.

9. He testified that during the entire period of interrogation by the police there were no threats or promises when in fact there had been.

10. He testified that no promise, threat or remark had been made to him with respect to the Lanza, Griffin, Stevens, Gaspari or MacIntosh matters when in fact there had been.

11. He testified that he never felt he was under investigation for any of those five matters when in fact he knew he was.

12. He testified on cross-examination that Charles Vernale was a customer of Miller & Fellin, Inc. whereas the redacted evidence shows that Miller did all his business with Vernale after hours; that none of the work was put in the records of Miller & Fellin, Inc. and that Vernale would call Miller & Fellin, Inc. but would hang up if anyone except Mr. Miller answered.

13. He testified on cross-examination that he only did repairs on sets at Vernale's request on two occasions, whereas in the redacted testimony he admitted first that he had repaired sets a lot of times at Vernale's request and specifically identified 10 different persons and occasions when he did such repairs.

14. In line with 13. the redacted statement of Captain Wayne Bishop of the Connecticut State Police before the Grand Jury was that Miller had claimed he repaired 7 or 8 sets at Vernale's request.

15. He testified on cross-examination that he had repaired only one set on one occasion at Vernale's home, whereas in the redacted statements he admitted repairing several sets at Vernale's home.

16. He testified on cross-examination that he had not seen Charles Vernale since 1967 while in his redacted statement of 2/17/69 he said he had been to Vernale's house three months prior to look at a television set and furniture that Vernale had for sale.

17. The testimony of Edward Stevens which the court excluded on the State's objection was in contradiction to redacted portions of Miller's statements in several respects. One such respect was the statement of Stevens that Miller approached him in Stevens' home and offered to sell him a brand new set, whereas Miller said that Stevens asked him to sell him a set during a fortuitous meeting on the street.

18. Another such respect was Stevens' testimony that the purchase price was $549 whereas Miller had said it was $400.

19. Another such respect was Stevens' testimony that Miller told him the set was new whereas Miller had stated the set was used, and that Stevens had been told this.

20. A significant withholding was of statements of Miller concerning the prices he paid Vernale, since Miller admitted the prices were well below the cost that would be paid if the sets had been obtained through legitimate channels.

21. Another significant withholding was of the statements of Miller indicating at various times that he knew,

believed or suspected that the sets he got from Vernale were stolen either when he got them or shortly thereafter (and clearly a year or more before the police questioned him). Some of these statements clearly read as admissions of criminal knowledge and activity.

22. There were also withholdings of statements contradictory to each other. One such example would be Edward Miller's statement on 2/17/69 that he had been to Vernale's home on several occasions and that he and Vernale were friendly followed by a statement the next day that he hardly knew Vernale.

23. Another such example would be his redacted statement of 2/18/69 that he saw one or two sets at a time in Vernale's garage and his redacted grand jury testimony of 4/7/69 that he never saw a television set in Vernale's garage.

24. Another such inconsistency is found in his statement of 2/18/69 that he never repaired a set for a Mr. Zollo at Vernale's request but rather did so at Mr. Zollo's request and was paid by Mr. Zollo with his later statements before the grand jury that he did this repair at Vernale's request and was paid by Vernale.

ARGUMENT

Introduction:

Subsequent to Moynahan's conviction he appealed and thereafter petitioned for certiorari on all the issues now before this Court which petition was denied. *State* v. *Moynahan*, 164 Conn. 560, 325 A.2d 199 (1973), *cert. denied*, 414 U.S. 976 (1973).

The points now presented to this Court are the same issues, presented in converse form, which this Court did not consider necessary for review at that time. [See

Petition of Paul Moynahan for a Writ of Certiorari, Docket No. 73-328, Part III. Questions Sought To Be Reviewed, 1, 2, 5 and 6.] The respondent submits that less reason now exists since the converse of the issues raises no more than an argument over interpretation of settled constitutional principles.

1. The Limitation of Cross-Examination Violated the Respondent's Right to Confrontation.

The issue of the abridgement of the petitioner's Sixth/Fourteenth Amendment Right to Confrontation was properly found in favor of the respondent.

In this regard the District Court properly concluded that it was not bound by the Connecticut Supreme Court's conclusion of abandonment, since in the context of a review of the Record, that ruling was one of law, as it merely involved a determination of whether the necessary objections and exceptions were taken as required by Connecticut law. Consequently, the district court was free to reach its own independent conclusion. *Townsend* v. *Sain*, 372 U.S. 293 (1962).

Still further it is recognized that the waiver of a constitutional right to cross-examine is a federally reviewable matter. *Brookhart* v. *Janis*, 384 U.S. 1, 3-4 (1966).

In addition, insofar as the trial court's evidential ruling abridged a constitutional right they might be reviewed even if no objection were taken. *Gann* v. *Smith*, 318 F. Supp. 409, 412 (N.D. Miss. E.D. 1970), *app. dis.*, 443 F.2d 352 (5th Cir. 1971).

Thus, for several reasons, the court correctly concluded that a review of the threshold issue of abandonment was open to it. *Henry* v. *Mississippi*, 379 U.S. 443, 452-3 (1965).

Insofar as the merits are concerned it appears clear that the right to cross-examine with respect to a prosecution witness' bias, interest or motive is an integral part of the Sixth Amendment Right to Confrontation. *Davis* v. *Alaska*, 415 U.S. 308 (1974); *United States* v. *Harris*, 501 F.2d 1, 9 (9th Cir. 1974).

While the State argues that retroactivity bars the subsequent application of *Davis* v. *Alaska*, *supra*, it seems clear that the right recognized was not newly found since the application of the Confrontation Clause to cross-examination was already established by *Brookhart* v. *Janis*, *supra*, at p. 4; *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965). Consequently *Davis* v. *Alaska*, *supra*, merely represents an application of a settled rule to a particular set of facts rather than the expression of a new rule of law. *Chesney* v. *Robinson*, 403 F. Supp. 306, 311, fn. 10 (D. Conn. 1975) (also by Judge Blumenfeld).

Recent applications of *Davis* v. *Alaska*, *supra*, confirm its applicability to this case. Thus in *United States* v. *Croucher*, 532 F.2d 1042, 1045 (5th Cir. 1976) error was found in the fact that the trial judge barred the defense from inquiring about a witness' pending arrest in order to show his "vulnerability to pressure by the prosecution at the time he gave his testimony". See also *United States* v. *Miranda*, 510 F.2d 385 (9th Cir. 1975).

The State's reliance on the Second Circuit's decision in *United States* v. *Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975) does not seem well taken. It was recognized in that case that there was no evidence that the line of inquiry was real, since the court indicated that there was no *Brady* material produced and no claim that the prosecution failed to discharge its duty. *Ibid.* Therefore the case merely holds that it was not constitutional error to deny a right to ask questions about a promise of immunity when it appears that there was in fact no such promise.

The case under consideration is thus readily distinguishable since there was a substantial valid basis for cross-examination of Edward Miller. Therefore the denial of the right must be deemed to be reversible error. And this would be so even if there were no proof of prejudice. *Davis* v. *Alaska*, *supra*, at p. 318; *Brookhart* v. *Janis*, *supra*, at p. 3. Of course, in this case there would be prejudice in view of the importance of Miller and the later argument relative to his testimony. *United States* v. *Gerard*, 491 F.2d 1300, 1304 (9th Cir. 1974); *Terry* v. *Commonwealth*, 471 S.W. 2d 730, 732 (Ky. 1971); *People* v. *Mack*, 120 Ill. App. 2d 149, 256 N.E.2d 501 (1970).

Finally it should be noted that the same rule applies whether the denial is of the right of cross-examination to establish bias, interest or motive or of the admission of collateral evidence on this point, i.e., the Stevens and Gaspari testimony. *Johnson* v. *Brewer*, 521 F.2d 556, 561-2 (8th Cir. 1975).

Thus for this reason alone the district court was warranted in ordering a new trial.

2. The Withholding of Evidence Constituted a Due Process Violation.

It should be clear from the record in this case that exhaustive efforts were made by the defense to try and get evidence in the State's possession which would fit the constitutionally defined parameters of the State's duty to produce.

It filed a motion for exculpatory evidence long before trial which included specific requests for Grand Jury testimony and prior statements to the police. That motion was granted but it produced nothing. This prompted defense counsel to write to the State's Attorney to remind

him that exculpatory evidence had been requested. This resulted in a letter from the State's Attorney, which was the only production made by the State.

Thereafter the defense made a specific request for Edward Miller's statements and transcripts before cross-examination. The court granted the motion and directed the State to produce all material which might be of assistance to the defense. However, it declined to review the material but rather left it to the State to redact these statements. These redactions constituted the material first reviewed by the district court.

The district court in ruling in the respondent's favor found that the withholding of redacted statements of Edward Miller which related to his vulnerability to prosecutorial influence provided a ground for relief although the withholding of evidence dealing with his criminal involvement did not. In doing so the court approached the case from the standpoint of the law expressed in *United States* v. *Agurs*, — U.S. —, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976).

Needless to say the respondent agrees with the favorable portion of the district court's conclusion. He would, nonetheless, assert that there was too narrow an application of *Agurs* to the facts of the case.

Agurs actually addresses three potential situations: (1) where there has been a failure to disclose evidence indicating the commission of perjury, whether requested or not; (2) where there has been a failure to produce specifically requested evidence, which although not indicative of perjury, would nonetheless fit the request and be of assistance and (3) where there has been either a general request for all "*Brady* material" or "exculpatory information" or no request at all. *Id.*, 49 L.Ed. 2d at 349-352.

The conclusion of the majority seems to be that in case (1) materiality is not key since the acquiescence by the prosecution in perjury is in itself the matter which demands the remedy. Likewise in case (2) the knowing refusal of the prosecution to respond to a specific request may demand a remedy without regard for the ultimate materiality of the withheld information as measured by the potential which it might have on the outcome of the case. However, in situation (3) proof of materiality is clearly required. *Ibid.*

In this instance the respondent sees the case as falling more closely into both (1) and (2) than into (3).

First of all it is hard to see how the prosecution could sit back and allow the answers Edward Miller gave which are referenced in (1) through (11), all of which dealt with the influence of prior police interrogation on Miller's in-court testimony, since the answers he gave in court seem palpably false when measured against those earlier statements.

In like vein it seems hard to understand how the answers referred to in (12) through (24) *supra* do not also raise serious questions of perjury.[5]

In any event the respondent would suggest that the requests relative to Miller if not governed by case (1) would nonetheless fit case (2).

The pretrial request was general in requesting all exculpatory material but specific in requesting material relative to John Bishop and Charles Vernale. While Edward Miller was not included the respondent would suggest that it does not inevitably follow that his prior statements fall into case (3).

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[5] Footnote 3, *supra*.

First of all it appears that the State presented Miller as its only "clean" witness. See Petitioner's Brief, Appendix C, p. 25a. However, this does not mean that it was unaware of him or did not have him clearly in mind when the initial request for exculpatory material was made. Indeed, it seems obvious that situations will exist where the prosecution will have a key witness whom they wish to hide in which case they will ignore any revelation which might expose that witness. Therefore, it begs the issue to conclude that the knowing refusal to produce exculpatory matter concerning such a witness will be measured by the specificity of the defendant's request.

In any event it should be recognized that after Edward Miller's direct testimony there was a specific request and a *Giles* v. *Maryland*, 386 U.S. 66 (1966) order of production. Therefore the withheld statements of Miller were in fact withheld after a specific order of production. Consequently if the facts before trial did not bring the case into a (2) category the facts at trial did.

The significance of withholding in the (2) case situation was stressed by Justice Stevens in *Agurs*,

> "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id.*, 49 L.Ed 2d at 351.

The argument to the district court in this case also covered a broader spectrum of concerns than were ultimately found necessary to be considered, since respondent also stressed what he had argued both before the original trial and particularly during the motion for mistrial. That argument was that there in fact had never been a proper and timely response to the pretrial motion because (1) all the exculpatory evidence relating to

John Bishop was withheld until after the trial began notwithstanding the pretrial order to produce it; (2) the same was true as regarded Miller and Vernale, except that some was withheld during the trial as well and (3) as a result the defense never had proper production in a fashion appropriate to permit meaningful use of it. Particular reliance for this argument was on *United States* v. *Anderson*, 481 F.2d 685, 690 fn. 2 (4th Cir. 1973), *aff'd* 417, 211 (1974); *United States* v. *Donatelli*, 484 F.2d 505, 508 (1st Cir. 1973); *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); *United States* v. *Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y. 1967), *aff'd* 396 F.2d 158 (2d Cir. 1968); *Hamric* v. *Bailey*, 386 F.2d 390, 393 (4th Cir. 1967).

Consequently the respondent believes that the issue of conscious prosecutorial withholding of exculpatory material has broader constitutional implications in this case than the district court found necessary to ascribe to it.

In any event the district court was correct in its conclusion even if the issue is limited to the evidence referred to by it and even if it is considered to be a case (3) situation. This conclusion is fortified by the recent holding of the Fourth Circuit in *Boone* v. *Paderick*, 541 F.2d 447 (4th Cir. 1976). In that case the court held that the failure of the prosecution to reveal the existence of prior statements bearing upon a key witness' motive to testify for the state was a ground for relief under *United States* v. *Agurs*, *supra*, particularly where the arguments of the prosecution may have led the jury to believe that the witness was testifying without such motivation.

The *Boone* decision bears many similarities to the present one since defense counsel in that case likewise suspected prior influence but could not prove it, *Id.* at 449, and since the prosecution likewise sat quietly by

while the witness denied any promises or threats and then used such supposed absence as a basis for arguing to the jury. The case is also significant since the court found that while there might be a distinction sufficient to remove the in-court answers from the classification of clear perjury, they were nonetheless on the "edge of perjury". *Id.* at p. 450. In this case it would seem that the statements are well inside of those "edges" and the case is therefore stronger than the situation presented in *Boone.*

Finally the respondent submits that the nature of the withheld evidence and the importance of Miller as a witness makes it apparent that the "materiality" required in a (3) situation has been met. In this regard the respondent believes that *Agurs* sought mainly to clarify the standards governing the duty of disclosure and not to change the prior law with respect to it. Thus earlier cases involving similar withholding of evidence bearing on the credibility of an important prosecution wtness would also support the conclusion here. Indeed such cases generally involved fact situations much less compelling than is presented in this instance. Thus their precedential value is great. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *United States* v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975); *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974); *United States* v. *Fried*, 486 F.2d 201 (2d Cir. 1973); *United States* v. *Kaplan*, 470 F.2d 100 (2d Cir. 1972).

3. The Circumstances Surrounding the Invocation of the Fifth Amendment by a Prosecution Witness Gave Rise to a Violation of the Respondent's Due Process and Confrontation Rights.

The situation involving the invocation of the Fifth Amendment by Charles Vernale offers a strong if not compelling example of constitutional error.

The State trial court in this case refused to consider the issue mainly because it did not comprehend the legal basis of the claim. The prosecution, however, did. Nonetheless it refused to agree to a preliminary examination notwithstanding the representations by the defense and the offer of the trial judge. What makes that position difficult to sustain on any rational basis is the subsequent conduct of the State in asking a substantially damaging question after two prior invocations of the privilege. Finally the actions of the prosecution lose any possible remaining vestige of fair procedure when the use of the invocation in argument is reviewed.

The action of the prosecution in obtaining an invocation of the Fifth Amendment in front of the jury has been held to be a violation of the Confrontation Clause. *Douglas* v. *Alabama*, 380 U.S. 415 (1965).

The State, however, argues that its actions in this case do not compel reversal since there was no prosecutorial misconduct because it did not know that Vernale would plead the Fifth.

This argument is difficult to accept when it is recognized that (1) the defense brought it to the prosecution's attention; (2) Vernale's lawyer was in court prepared to state that he had so advised his client and expected he would invoke the Fifth; (3) the trial judge offered to inquire of Vernale whether he was going to invoke the privilege if the State agreed, but it would not; (4) the State asked Vernale a question and he invoked the Fifth; and (5) the State asked another question and Vernale invoked the Fifth.

Similarly the State now argues that its conduct cannot be harshly judged, since it only obtained three invocations of the Fifth. However, it fails to emphasize that the third question incorporated in leading form the

essential fact for which the witness was used. Therefore three questions were sufficient for it to do all the damage that the original objection envisioned.

Finally the prosecution referred to the invocation specifically in its closing argument.

The respondent thus submits that the record establishes a clear instance of an intentionally induced invocation, which practice was condemned in *Namet* v. *United States*, 373 U.S. 179 (1963); *Douglas* v. *Alabama*, *supra*; *Frazier* v. *Cupp*, 394 U.S. 731 (1969).

However, if the intention of the prosecution is not apparent nonetheless the resulting harm should be.

The case against the respondent was not a strong one. John Bishop was demeaned even by his own proponent, the State. Edward Miller's weight was enhanced by his insulation from cross-examination. Therefore, Vernale's invocation was a critical factor. And the State exploited it through its closing argument, which fact alone should establish the requisite prejudice. *Cain* v. *Cupp*. 442 F.2d 356, 358 (9th Cir. 1971); *United States* v. *Gerard*, *supra*, at p. 1304.

What the State then was really offering was the thief, who had made a deal, the middleman, who invoked the Fifth and the seller, who was concerned over his own possible arrest. Had the case proceeded in accordance with proper constitutional safeguards the jury would have heard more from the seller and less from the middleman. As it was the reverse was true, and it was error in both instances.

The other point which was considered by the district court was the impact of the attempted curative charge. The position of the defense is that such a charge cannot obviate a clear error, of the type with which we are now

involved. *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964); *San Fratello* v. *United States*, 340 F.2d 560 (5th Cir. 1965); *United States* v. *King*, 461 F.2d 53 (8th Cir. 1972). Judge Learned Hand agreed but felt bound by *Delli Paoli* v. *United States*, 352 U.S. 232 (1957) to rule in a contrary fashion. *United States* v. *Maloney*, 262 F.2d 535, 538 (2d Cir. 1959). However, *Delli Paoli* was subsequently overruled by *Bruton* v. *United States*, 391 U.S. 123 (1968).

The previously cited cases express the rule that either (1) when there has been conduct of the prosecution which induced an invocation of the privilege or (2) where there has been an invocation by an important witness to a question which would permit an inference as to a critical fact in issue then the force of either such occurrence cannot be dissipated by a charge to the jury admonishing them to erase from their minds the occurrence itself and any inferences which they might draw from it.

A close analysis of *Frazier* v. *Cupp*, *supra*, does not suggest a contrary result. The Court there was at most concluding that in its totality the asserted error did not present a basis for reversal. In so doing it considered the curative charge in relation to the inquiry itself, the circumstances surrounding it and the overall evidence in order to assess the potential impact upon the jury. *Id.* at pp. 735-6. Therefore it was not inconsistent with *Cain* v. *Cupp*, *supra*, or the rationale of Judge Hand in *United States* v. *Maloney*, *supra*, which decisions expressed the reality that once a clear error is committed a charge will not cure it.

Frazier v. *Cupp*, *supra*, can thus be viewed as merely enunciating a rule that each situation must be subjectively evaluated to determine whether there has been an error of constitutional proportion and not as a case which recognizes a charge as a cure-all for an error of the kind

falling within either (1) or (2) *supra*. This also seems to be the clear implication of later cases which applied a similar subjective test. *United States* v. *Fleming*, 504 *F*.2d 1045, 1049 (7th Cir. 1974); *United States* v. *West*, 486 F.2d 468, 472 (6th Cir. 1973); *United States* v. *Clark*, 398 F. Supp. 341, 368-9 (E.D. Pa. 1975). Such an interpretation thus harmonizes any claim of inconsistency between *Cain* v. *Cupp*, *supra* and *Frazier* v. *Cupp*, *supra*.[6]

The respondent submits that this case presents the worst of both those situations described in (1) and (2), *supra*. Therefore, an error of constitutional dimension necessarily flowed from these facts and should, standing alone, compel an order for a new trial.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

RESPONDENT, PAUL MOYNAHAN

By: EDWARD F. HENNESSEY
JAMES A. WADE

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[6] It is worthwhile to note that *Cain* v. *Cupp*, *supra*, reflects the Ninth Circuit's own interpretation of the Supreme Court's affirmance in *Frazier* v. *Cupp*, *supra*, of an earlier Ninth Circuit decision. *Gladden* v. *Frazier*, 388 F.2d 777 (9th Cir. 1968), *aff'd sub nom. Frazier* v. *Cupp*, 394 U.S. 731 (1969).